

WRITTEN STATEMENT,
ORDER VIII RULE 1
CODE OF CIVIL PROCEDURE

1. DEVELOPMENT OF UNIFORM CODE CIVIL PROCEDURE IN INDIA

- a) The history of civil procedure we have in India today dates back to the year 1859, when the first uniform code of civil procedure was enacted. Before 1859, there was no uniform law of civil procedure applicable to the whole of the country. The first effort in the direction of evolving a uniform procedure was made when Sir Charles Wood, then President of the board for the affairs of India, directed the Second Law Commission to address themselves to the preparation of “a code of simple and uniform procedure” applicable to all the courts. The Commission prepared four draft codes of procedure, which were intended to apply to ordinary civil courts of the lower provinces of Bengal, the presidencies of Madras and Bombay and the North-Western Provinces. **Four bills based on these drafts were ultimately amalgamated and enacted as the code of civil procedure, 1859.** The Code of 1859 was, however, not applicable to the Supreme Court in the Presidency towns and to the Presidency Small Cause Courts.
- b) **THE 1877 CODE** –The 1859 Code was soon found to be “ill-drawn, ill-arranged and incomplete”. In 1863-64, a fairly comprehensive Bill was prepared by Mr. Harrington to replace it. But, for some reasons, the enactment of the bill into law was deferred. The work of revision was taken up seriously when Dr Whitley Stokes, at that time Secretary to the Government of India in the Legislative Department, was permitted by the Law member to re-cast the draft Bill prepared by Mr. Harrington. Sir Arthur Hobhouse, who was then Law Member, made substantial contribution to draft the Bill. With certain modifications, the Bill was enacted as the code of Civil Procedure, 1877.
- c) **THE 1882 CODE** –Soon after the enactments of the 1877 code it was realized that the new Code required several amendments. As many as 130 sections of the Code were amended in 1879. Further amendments were proposed in 1882. It was then decided that the code should be completely re-cast. It was in these circumstances that the Code of Civil Procedure, 1882, was enacted.
- d) **THE 1908 CODE** – Experience of a quarter of a century of the working of the Code of 1882 showed that the general lines on which it proceeded were sound. It was, however, discovered

that in respect of some matters the provisions of the code were too rigid to meet sufficiently the varying needs of the different areas of the country. Moreover, there was some conflict of judicial opinion on the interpretation of certain provisions of the code. To remedy these and other defects, a comprehensive revision of the Code was undertaken in the first decade of this century. The revision was undertaken by a select committee, which collected valuable material on the subject and prepared a draft Bill. The Bill, as settled by the Special Committee, was enacted as the Code of Civil Procedure, 1908.

2. ORDER VIII, R.1 UNDER THE AMENDMENT ACT, 1908.

RULE 1. WRITTEN STATEMENT

[(1)] the defendant shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defense.

[(2) Save as otherwise provided in rule 8A, where the defendant relies on any document (whether or not in his possession or power) in support of his defence or claim for set-off or counter-claim, he shall enter such documents in a list, and shall,-

(a) If a written statement is presented, annex the list to the written statement :

provided the where the defendant, in his written statement, claims a set-off or counter claim based on a document in his possession or power, he shall produce it in a court at the time of presentation of the written statement and shall at the same time deliver the document or copy thereof to be filed with the written statement;

(b) If a written statement is not presented, present the list to the court at the first hearing of the suit.

(3) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(4) If no such list is annexed or presented, the defendant shall be allowed such further period for the purpose as the court may think fit.

(5) A document which ought to be entered in the list referred to in sub-rule(2), and which is not so, entered, shall not, without the leave of the court, be received in evidence on behalf of the defendant at the hearing of the suit.

(6) Nothing in sub-rule (5) shall apply to documents produced for the cross examination of the plaintiff's witnesses or in the answer

to any case set up by the plaintiff subsequent to the filing of the plaint, or handed over to a witness merely to refresh his memory.

(7) Where a court grants a leave under sub-rule (5), it shall record its reasons for doing so, and no such leave shall be granted unless good cause is shown to the satisfaction of the court for the non-entry of the document in the list referred to in sub-rule (2).

New facts must be specially pleaded

2. The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

Denial to be specific

3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

Evasive denial

4. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

Specific denial

5. [(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary **implication**, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

5 [(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.]

Particulars of set-off to be given in written statement

6.(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) Effect of set-off.--The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off : but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Counter-claim by defendant

6A.(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not :

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.]

Counter-claim to be stated

6B.Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.]

Exclusion of counter-claim

6C.Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.]

Effect of discontinuance of suit

6D.If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.]

Default of plaintiff to reply to counter-claim

6E.If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit.]

Relief to defendant where counter-claim succeeds

6F.Where in any suit a set-off or counter-claim is established as a defence against the plaintiff's claim, and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.]

Rules relating to written statement to apply

6G.The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.]

Defence or set-off founded upon separate grounds

7.Where the defendant relies upon several distinct grounds of defence or set-off 6[or counter-claim] founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

New ground of defence

8.Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off 8[or counter-claim] may be raised by the defendant or plaintiff as the case may be, in his written statement.

[Duty of defendant to produce documents upon which relief is claimed by him

8A. (1) Where a defendant bases his defence upon a document in his possession or power, he shall produce it in court when the written statement is presented by him and shall, at the same time, deliver the document or a copy thereof, to be filed with the written statement.

(2) A document which ought to be produced in court by the defendant under this rule, but is not so produced, shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit.

(3) Nothing in this rule shall apply to documents produced,-

(a) For the cross-examination of the plaintiff's witnesses, or

(b) In the answer to any case set up by the plaintiff subsequent to the filing of the plaint, or

(c) Handed over to a witness merely to refresh his memory.]

Subsequent pleadings

9.No pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counterclaim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

Procedure when party fails to present written statement called for by Court

10.Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

3. ORDER VIII, RULES UNDER THE AMENDMENT ACT, 1999.

R.1 WRITTEN STATEMENT. - The defendant shall at or before the first hearing or within such time as the court may permit, which shall not be beyond thirty days from the date of service of summons on the defendant, present a written statement of his defence.

Rule 1. Written statement

[(1)] the defendant shall, at or before the first hearing or within such time as the Court may permit, **which shall not be beyond thirty days from the date of service of summons on the defendant**, present a written statement of his defence.

[(2) Save as otherwise provided in rule 8A, where the defendant relies on any document (whether or not in his possession or power) in support of his defence or claim for set-off or counter-claim, he shall enter such documents in a list, and shall,-

(c) If a written statement is presented, annex the list to the written statement :

provided the where the defendant, in his written statement, claims a set-off or counter claim based on a document in his

possession or power, he shall produce it in a court at the time of presentation of the written statement and shall at the same time deliver the document or copy thereof to be filed with the written statement;

(d) If a written statement is not presented, present the list to the court at the first hearing of the suit.

(3) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(4) If no such list is annexed or presented, the defendant shall be allowed such further period for the purpose as the court may think fit.

(5) A document which ought to be entered in the list referred to in sub-rule(2), and which is not so, entered, shall not, without the leave of the court, be received in evidence on behalf of the defendant at the hearing of the suit.

(6) Nothing in sub-rule (5) shall apply to documents produced for the cross examination of the plaintiff's witnesses or in the answer to any case set up by the plaintiff subsequent to the filing of the plaint, or handed over to a witness merely to refresh his memory.

(7) Where a court grants a leave under sub-rule (5), it shall record its reasons for doing so, and no such leave shall be granted unless good cause is shown to the satisfaction of the court for the non-entry of the document in the list referred to in sub-rule (2).

***After rule 1 so inserted, the following rule shall be inserted-**

1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him-

(1) Where the defendant bases his defence or power, in support of his defence or claim for set-off or counter claim, he shall enter such document in a list, and shall produce, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) Where a document or a copy thereof is not filed with the written statement under this rule, it shall not be allowed to be received in evidence on behalf of the defendant at the hearing of the suit.

(4) Nothing in this rule shall apply to documents-

(a) Produced for the cross examination of the plaintiff's witnesses,
or

(b) Handed over to a witness merely to refresh his memory.

New facts must be specially pleaded

2.The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

Denial to be specific

3.It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

Evasive denial

4.Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

Specific denial

5. [(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary **implication**, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

5 [(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.]

Particulars of set-off to be given in written statement

6.(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not

exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) Effect of set-off.--The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off : but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Counter-claim by defendant

6A.(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not :

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.]

Counter-claim to be stated

6B.Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.]

Exclusion of counter-claim

6C.Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.]

Effect of discontinuance of suit

6D.If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.]

Default of plaintiff to reply to counter-claim

6E.If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit.]

Relief to defendant where counter-claim succeeds

6F.Where in any suit a set-off or counter-claim is established as a defence against the plaintiff's claim, and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.]

Rules relating to written statement to apply

6G.The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.]

Defence or set-off founded upon separate grounds

7.Where the defendant relies upon several distinct grounds of defence or set-off 6[or counter-claim] founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

New ground of defence

8. Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off 8[or counter-claim] may be raised by the defendant or plaintiff as the case may be, in his written statement.

***According to the amendment of Code of Civil Procedure, 1999, following rules have been omitted-**

Rule 8A, Rule 9 and Rule 10.

4. ORDER VIII, RULES UNDER THE AMENDMENT ACT, 2002.**Rule 1. Written statement**

*[(1)] the defendant shall, at or before the first hearing or within such time as the Court may permit, which shall not be beyond thirty days from the date of service of summons on the defendant, present a written statement of his defence.

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

*Substituted by the code of Civil Procedure (Amendment) Act, 2002.

High Court Amendment-

[Bombay]

1. Written Statement- The defendant *may* and if so required by the Court, shall within such time as may be specified in this behalf or within such extended time as the court may permit, present a written statement of his defence after serving a copy thereof on.

[(2) Save as otherwise provided in rule 8A, where the defendant relies on any document (whether or not in his possession or power) in support of his defence or claim for set-off or counter-claim, he shall enter such documents in a list, and shall,-

(e) If a written statement is presented, annex the list to the written statement :

provided the where the defendant, in his written statement, claims a set-off or counter claim based on a document in his possession or power, he shall produce it in a court at the time of presentation of the written statement and shall at the same time deliver the document or copy thereof to be filed with the written statement;

(f) If a written statement is not presented, present the list to the court at the first hearing of the suit.

(3) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(4) If no such list is annexed or presented, the defendant shall be allowed such further period for the purpose as the court may think fit.

(5) A document which ought to be entered in the list referred to in sub-rule(2), and which is not so, entered, shall not, without the leave of the court, be received in evidence on behalf of the defendant at the hearing of the suit.

(6) Nothing in sub-rule (5) shall apply to documents produced for the cross examination of the plaintiff's witnesses or in the answer to any case set up by the plaintiff subsequent to the filing of the plaint, or handed over to a witness merely to refresh his memory.

(7) Where a court grants a leave under sub-rule (5), it shall record its reasons for doing so, and no such leave shall be granted unless good cause is shown to the satisfaction of the court for the non-entry of the document in the list referred to in sub-rule (2).

1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him-

- (5) Where the defendant bases his defence or power, in support of his defence or claim for set-off or counter claim, he shall enter such document in a list, and shall produce, at the same time, deliver the document and a copy thereof, to be filed with the written statement.
- (6) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.
- (7) Where a document or a copy thereof is not filed with the written statement under this rule, it shall not be allowed to be received in evidence on behalf of the defendant at the hearing of the suit.
- (8) Nothing in this rule shall apply to documents-
 - (c) Produced for the cross examination of the plaintiff's witnesses, or
 - (d) Handed over to a witness merely to refresh his memory.

New facts must be specially pleaded

2. The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

Denial to be specific

3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

Evasive denial

4. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

Specific denial

5. [(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary **implication**, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

5 [(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.]

Particulars of set-off to be given in written statement

6.(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) Effect of set-off.--The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off : but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Counter-claim by defendant

6A.(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not :

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.]

Counter-claim to be stated

6B.Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.]

Exclusion of counter-claim

6C.Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.]

Effect of discontinuance of suit

6D.If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.]

Default of plaintiff to reply to counter-claim

6E.If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit.]

Relief to defendant where counter-claim succeeds

6F.Where in any suit a set-off or counter-claim is established as a defence against the plaintiff's claim, and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.]

Rules relating to written statement to apply

6G.The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.]

Defence or set-off founded upon separate grounds

7. Where the defendant relies upon several distinct grounds of defence or set-off 6[or counter-claim] founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

New ground of defence

8. Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off 8[or counter-claim] may be raised by the defendant or plaintiff as the case may be, in his written statement.

*** Rule 9 and Rule 10 has been re-substituted by the Code of Civil Procedure (Amendment) Act, 2002**

Subsequent pleadings

9. No pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counterclaim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

Procedure when party fails to present written statement called for by Court

10. Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

5. STEPS TO BE TAKEN BY THE DEFENDANT WHEN THE WRITTEN STATEMENT IS NOT FILED WITHIN 90 DAYS FROM THE DATE OF SERVICE OF SUMMONS.

5.1 It is comprehensively accepted that the circumstances are strange and unexpected for the applicants in real and can arise unexpectedly. These are the circumstances which may be far more diverse than what can be expected by Judiciary of India. Due to

the unpretentious reasons, under **Section 5** of the **Limitation Act, 1963** extension to file the Written Statement shall be granted by the discretion of the Court.

5.2 The following steps shall be followed by the Defendants-

- When the outer limit of *Ninety days* of filing Written Statement is spanned, the Rule 1 of Order VIII of Code of Civil Procedure gives the provision to Defendant to file an application for condonation of delay in filing Written Statement.
- The provision comes along with the exception that the reason shall be genuine and unavoidable on the part of the Counsel or the Party to the Suit. It is mandatory for Defendant to put down the reason for delay under *Clause 61-Sub Clause (ix) Objects and Reasons(Bill)*.
- Defendant shall abide the **cost** for causing delay under **section 35-B of the Code of Civil Procedure.**

Section 35-B -

If ,on any date fixed for the hearing of the suit or for taking the steps therein, a party to the suit fails to take the step which was required by or under this code to take on that date OR obtains an adjournment for taking such step or for producing evidence or on any other ground, the court may, for reasons to be recorded, **make an order requiring such party to pay to the other party such costs** as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the court on that date and the payment of such costs shall be condition precedent to the further prosecution of the defence by the defendant, where the defendant was ordered to pay such costs.

6. JURISDICTION OF THE COURT ON CONDONING THE DELAY OF THE DEFENDANT IN FILING OF WRITTEN STATEMENT WHEN THE OUTER LIMIT IS SPANNED

- 6.1 The 2002 Amendment has arisen a lot of confusion for all the lawyers. It has challenged that whether provision under Order VIII is mandatory or directory. The amendment has given the

jurisdiction to the Court under Rule 1 and Rule 10 of Order 8 of Code of Civil Procedure to pronounce the judgment against the defendant even if the written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provisions of Order 8, Rule 1 and Rule 10, the doctrine of Harmonious Construction is vital to be applied. It would lead to under Rule 10 of Order VIII; **the court in its discretion would have the power to allow the defendant to file the written statement even after the expiry of the period of 90 days provided under Order VIII Rule 1.** Clearly, therefore, the provision of Order VIII Rule 1 providing for the upper limit of 90 days to file written statement is not mandatory but directory.

6.2 In justifying the directory nature of the proviso, several other provisions of the code and allied laws were sought to be pressed into service.

7. SOME OF SUCH PROVISIONS ARE BRIEFLY DISCUSSED HERE:

7.1 **Section 148 of the Code of Civil Procedure** empowers the court to extend the time limit in the exceptional cases.

S. 148. Enlargement of time.— Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this code, the Court may, in its discretion, from time to time, enlarge each period not exceeding thirty days in total, even though the period originally fixed or granted may have expired.

7.2 **Section 151 of the Code of Civil Procedure** protects the intrinsic power of the court to safeguard justice and prevent misuse of the court. It is universal and the supreme provision practiced in all eminent Courts of India.

S.151. Saving of inherent powers of Court-Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court.

7.3 **Section 5 of the Limitation Act, 1963** has specified the provision for the **Extension of prescribed period in certain cases. It confers upon the Court the discretion to condone delay.** According to **Sec 5, any appeal or any application, other than**

an application under any of the provisions of Order XXI of the Civil Procedure Code, 1908, May satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

- When the delay is found to be sufficient by the court then one may not be entitled to the condonation of delay as a matter of right. It is only in such circumstances the discretion of the Court is exercisable for condonation of delay.
- When it is found that deliquescence and bona fide were manifest for claiming such condonation, discretion of the Court is exercisable in favour of the applicant.

This has been mentioned in the case- Laxmi Devi v. State of UP AIR 1988 All 133

- Where the cause of delay is the official reason and also inaction on the part of assistant Government pleader there must be condonation of delay-

This has been mentioned in the case- State of Maharashtra v. Mastasood 1990(2) Civil LJ 335.

8. JUDGMENTS PRIOR TO 1999 AMENDMENT OF CODE OF CIVIL PROCEDURE

Vithal Ramchandra Patil vs. Bhagwat Waman Gaikwad and Ors

Reported in 1997(4) BomCR327, 1996(2) MhLj1064

It is well-established principle of law that inherent powers of the court could be invoked to meet the ends of justice and if, it is found that there is apparent injustice likely to be caused to any of the parties, obviously the Court could resort or invoke the said powers.

In the instant case, Regular Civil Suit was filed by the present Respondent No.1 as a Plaintiff against the present Petitioner and three others in the Court of the Civil Judge, on the ground that the Sale Deed dated 12th May, 1976 executed by the original Defendant No.2 be declared as sham and bogus and not binding on the Plaintiff and the original Defendants Nos.2 to 5. The Suit was filed on 31st March, 1981 and summons was issued on 1st April, 1981 thereby fixing the date for appearance of the Defendants and for filing of Written Statement on 21st April, 1981. The record indicates that from 21st April, 1981, about 7 to 8 adjournments were given on this count. On every date, necessary application was made for extension of time to file the Written Statement. The

material date is 30th July, 1983 on which date, again, the Defendant No.1 failed to file his Written Statement and sought for adjournment. The Learned Judge granted time to the Plaintiff to file his Affidavit in support of the suit claim on 11th November, 1983. Thereafter, it appears from the record that it was on 5th September, 1983 only, on which date the Plaintiff filed Affidavit in pursuance of the Order dated 30th July, 1983. On 5th September, 1983 itself the Defendant No.1 filed Application requesting the Court to take his Written Statement on record and the Learned Civil Judge, rejected the same by his Order dated 13th February, 1984, whereby the Learned Judge of the Trial Court ordered, “*Heard. Vide Order dated 20-08-1982, the Defendant No.1 is proceeded in default of Written Statement relying on the authority reported in 1982 M.L.J. 188, this Application stands rejected*”

The Learned Counsel for the Petitioner argued that it was necessary in the interest of justice to have allowed the Written Statement of Defendant No.1 on record and since according to him the Learned Judge of the Trial Court failed to exercise properly the jurisdiction vested in him. It is also noticed that the Learned Judge of the Trial Court has nowhere referred to any provision of law while passing the specific order. Thus it is pertinent that the Decree could not be under Order 8 Rule 10. The Learned Counsel for the Petitioner also argued that the Written Statement can be permitted during the course of any stage of hearing till the passing of the judgment and decree by the concerned Court. The Learned Counsel in support of his contention relied on two decisions and they are (i) MANU/WB/0022/1987 Ramesh Chandra Bhattacharya vs. Corporation of Calcutta & Ors. And (ii) AIR 1987 Cal111 Mehar Chand vs. Suraj Bhan 2.

The Learned Counsel had put forward his view stating that since the matter is already admitted it would not be fair for this Court to deal on this point at this stage, particularly when the Respondents are also not represented before this Court. However, in the interest of Justice the Defendant No.1 should be allowed to file his Written Statement and after taking the same on record, the Learned Judge of the Trial Court shall proceed with the matter and dispose off the suit by end of March 1997, in any case.

With this direction the Writ Petition was allowed.

VIMALKUMAR NATHMAL GOENKA VS. VINOD KUMAR NATHMAL GOENKA & ORS.

Reported in AIR-1999 Bom-51

In the instance case, admittedly the Defendant No.3 did not file any Written Statement even though Defendant was given enough

opportunity to file Written Statement by the Trial Court. The suit was fixed for ex-parte hearing and evidence of the Plaintiff was recorded by the Trial Court on 12.12.1997. The matter was fixed on 18.12.1997 for arguments and thereafter it was fixed for Judgment on 29th December 1997. It is an admitted position that on 29.12.1997, the Trial Court had neither delivered nor pronounced the Judgment. On the other hand, it appears that the matter was adjourned for passing necessary orders. Thereafter, on 5.03.1998, the Applicant fixed an Application for taking Written Statement on record and the Written Statement was annexed to that Application. Both the Applications filed by the Applicant were considered by the Trial Court on 27.03.1998 and came to be rejected by the Trial Court.

In order to consider the issue it will be meaningful to consider purport of Order VIII Rule 10 of the Code of Civil Procedure. There is no difficulty in coming to the conclusion that Rule 10 give discretion to the Court and the Court can permit the Defendant to file Written Statement at any stage prior to pronouncement of Judgment. Mere reading of Rule 10 makes it clear that the Court can either pronounced ***Judgment against the Defendant in the absence of Written Statement or passed any Order as it thinks fit.*** However, in the instance case, admittedly the same had not been done by the Trial Court and the matter was posted for passing necessary orders on the Application preferred by the Applicant. Since Judgment was not pronounced in the matter by the Trial Court on the date on which it was fixed, the pronouncement of judgment i.e. 29.12.1997 and the matter was adjourned for passing necessary orders. Thus, it cannot be said that the Trial Court had exhausted the jurisdiction vested in it as per Order VIII Rule 10 of CPC, nor can it be construed that the Trial Court had no jurisdiction to accept the Written Statement. Hence, once the Suit was adjourned to the future date, it is impliedly clear that the Trial Court had exercised discretion contemplated mentioned in Rule 10 of Order VIII of CPC. It is, therefore, not possible in the facts and the circumstances of the present case to hold that the Trial Court was not competent to accept Written Statement filed by the Original Defendant.

Ramesh Chand Vs. Punjab National Bank and Ors. (AIR 1990 S.C 1147)

In the aforementioned case, The Honorable Division Bench mentioned that although the conduct of the appellants has certainly been far from satisfactory and it does appear that they have tried to delay the matters, one final opportunity could be given to them for filing the written statement on certain conditions. In the event of the appellants' depositing in court a sum of Rs.two lakhs within a period of four weeks from today the impugned order will be set aside and they will be permitted to file their written statement within one week thereafter. In the event of their not

depositing the amount within such time the appeal shall stand dismissed with cost without any further orders. In the event of deposit being made respondent No.1 will be at liberty to withdraw the same subject to further orders of this Court. The deposit will be made without prejudice to the rights of the appellants. The appeal is disposed of. In the event of deposit of Rs.2, 00,000/- being made within aforesaid time there will be no order as to costs of the appeal which will be disposed of as aforesaid. In the event of deposit not being made within aforesaid time there will be an order of costs as aforesaid.

Thus it was held by the Hon'ble Division Bench that one final opportunity could be given for filing Written Statement on condition that Defendant should deposit in court an amount of Rs.2,00,000/- within specify time.

9. JUDGMENTS POST 2002 AMENDMENT OF CODE OF CIVIL PROCEDURE

Kailash Vs. Nanhku and Ors. (AIR 2005 S.C 2441)

In the aforementioned case, the appellant was served with the summons, requiring his appearance before the court on 06.04.2004. On the request of the Counsel of the appellant on the appointed day, the Court granted permission till 13.05.2004 for filing the written statement. On 13.05.2004, the appellant applied for extension of time on the ground that copies of several documents were required to be obtained. Considering the application of the appellant, the Court adjourned the hearing till 3.07.2004 as between 13.05.2004 to 2.07.2004; the High Court was closed for summer vacations. During the summer vacations, on 22.06.2004, the nephew of appellant's advocate passed away. Although the Written statement was drafted during the summer vacations and was kept ready for filing, the same was filed only on 8.07.2004 with an application for condonation of delay stating the aforementioned reason. On 23.8.2004, the High Court rejected the application filed by the appellant and refused to take the written statement on record for the reason that the same was filed beyond a period of 90 days from the date of service of summons under Rule 1 of Order VIII of CPC.

In appeal against the refusal of the High Court to accept the written statement on the ground of expiry of the prescribed period of 90 days, **The Honorable Supreme Court while setting aside the order of the High Court passed a landmark judgment stating that-**

Considering the object and purpose behind enacting Rule 1 of Order VIII, C. P. C. in 2002, in the present form and the context in

which the provision is placed, **the provision has to be construed as directory and not mandatory.** In exceptional situations, **the Court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired.** However, the Court may not be misunderstood as nullifying the entire force and impact the entire life and vigor of the provision. The delaying tactics adopted by the defendants in law Courts are now proverbial as they do stand to gain by delay.

The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence. Ordinarily, the time schedule prescribed by Order VIII, Rule 1 has to be honored. The extension of time sought for by the defendant from the Court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for asking more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order VIII, Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended. **The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the Court.** In no case, the defendant shall be permitted to seek extension of time when the Court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The Court may impose costs for dual purpose:

- (i) To deter the defendant from seeking any extension of time just for asking and
- (ii) To compensate the plaintiff for the delay and inconvenience cause to him.

SHAIKH SALIM HAJI ABDUL KHAYUMSAB VS. KUMAR

(AIR 2006 SC 396)

In the above mentioned case, the appellants were summoned on 21.10.2003 and sought time to file the Written Statement, which was granted first until 17.11.2003 and for a second time until 19.02.2004. The latter date being a holiday, the Written Statement was filed on 20.02.2004. The Trial Court refused to accept the Written Statement on the ground of Limitation Act. The Supreme

Court found that the Trial Court had itself granted time up to 19.02.2004. this fell beyond the period of 90 days. On the reasoning, that had the Written Statement been filed on 19.02.2004, the Trial Court could not have refused to accept the Written Statement as it was within the time granted by it. It was held dismissed as according to the Court, a mere fortuitous circumstances cannot make the Written Statement filed.

While the Court reasoned its decision on the said basis, the same result could have been reached at by relying on the provisions of the Limitation Act, 1963 since the said Act vehemently provides that where the last date of limitation is a holiday, the limitation extends to the date on which the concerned court re-opens. The precise question, therefore, that the Apex Court was called to answer was whether it was at all within the power of the Trial Court to provide a date which was beyond the period of 90 days.

What appears to weigh with the Court in the aforementioned case is the principle that no person can be made to suffer because of an error on the part of judicial authority.